NO. 81-5312

Office-Supreme Court, U.S.
FILED
OCT 1 1981
ALEXANDER L. STEVAS,
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

WILLIAM KENNY STEPHENS,

Petitioner,

V.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

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81-5312

QUESTIONS PRESENTED

1.

Whether one statutory aggravating circumstance which has been established beyond a reasonable doubt and which has been upheld on appeal, is sufficient to support a death penalty when two statutory aggravating circumstances found by the jury were reversed on appeal?

2.

Whether the trial court's charge to the jury on implied malice was an unconstitutional shift of the burden of proof?

3.

Whether the Petitioner's prior criminal record was improperly submitted to the jury as a statutory aggravating circumstance.

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BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

Petitioner, William Kenny Stephens, was indicted by the Superior Court of Richmond County, Georgia on January 30, 1979. Petitioner was charged with three counts of aggravated assault and the murder of Larry D. Stevens, Jr., an officer with the Richmond County Sheriff's Department. (R. 3).

Petitioner was tried on February 12-16, 1980 in the Superior Court of Richmond County. The jury found the Petitioner guilty on all counts of the indictment and recommended the death penalty based on the finding of three statutory aggravating circumstances beyond a

reasonable doubt. (R. 212, 213). Petitioner subsequently filed an appeal with the Georgia Supreme Court. (R. 1). The conviction was affirmed on June 2, 1981. Stephens v. State, 247 Ga. 698, 278 S.E.2d 398 (1981). Petitioner filed a Motion for Rehearing in the Georgia Supreme Court which was denied on June 24, 1981. On August 22, 1981 Petitioner filed a Petition for Writ of Certiorari in this Court.

The evidence at trial showed that on January 22, 1979, Petitioner was stopped by Investigators Tom Perry and Larry Stevens of the Richmond County Sheriff's Department and arrested for driving under the influence of alcohol and driving without a license. (T. 648). Petitioner was released upon his own recognizance after he agreed to report back to the officers and to supply them with information about weapons recently stolen in a department store burglary. (T. 624, 654). When Petitioner failed to report to the officers as had been agreed, the officers began to look for him. (T. 625). On January 24, 1979, Investigator Stevens located Petitioner driving in his car and stopped him. (T. 631).

It was later determined that Investigator Stevens had been shot three times with a high powered rifle by Petitioner at close range. The only eyewitness to the shooting was a postman who was making rounds at the time of the shooting. He saw the final and fatal shot, which was fired by Petitioner, through the rear windshield of Investigator Steven's car striking him in the chest and severing both large arteries of his heart. (T. 924).

After killing Investigator Stevens, Petitioner quickly drove away and went by a hardware store, where he purchased

more ammunition. (T. 692). Shortly afterwards, he was spotted by patrolmen and a high speed chase ensued. (T. 695-696). He was stopped on a dead-end cul de sac and, after a gun battle with three deputy sheriff officers, was arrested. (T. 696, 704, 695-967).

Further facts will be developed as necessary for a more thorough illumination of the issues raised in this Petition for Writ of Certiorari.

REASONS FOR NOT GRANTING THE WRIT

I. A DEATH PENALTY IMPOSED ON THE BASIS OF A STATUTORY AGGRAVATING CIRCUMSTANCE ESTABLISHED BEYOND A REASONABLE DOUBT SHOULD BE UPHELD EVEN THOUGH OTHER STATUTORY AGGRAVATING CIRCUMSTANCES WERE REVERSED ON APPEAL.

Ga. Code Ann. § 27-2534.1 provides that a finding of any one or more of certain statutorily enumerated statutory aggravating circumstances shall be sufficient to enable a jury to impose the death penalty. The statutory aggravating circumstances are set forth in Ga. Code Ann. § 27-2534.1(b)(1)-(10). Pursuant to said Section, Petitioner was sentenced to death after the jury found beyond a reasonable doubt that (1) the offense of murder was outrageously and wantonly vile, horrible and inhuman in that it involved depravity of mind; (2) the murder was committed for the purpose of preventing the lawful arrest of the offender; and (3) the murder was committed against a peace officer while he was engaged in the performance of his official duties. Ga. Code Ann. § 27-2534.1(b)(7), (10), and (8).

On appeal, the Georgia Supreme Court reversed the first and second statutory aggravating circumstances above as found by the jury but upheld the third statutory aggravating circumstance, finding that, "the evidence factually supports a finding beyond a reasonable doubt that the offense of murder was committed against a peace officer while he was engaged in the performance of his official duties." Stevens, Id. at 708. Clearly, a jury is able to reach such a conclusion based on a factual determination separate and

distinct from its findings as to the prior two statutory aggravating circumstances.

After upholding the third aggravating circumstance, the Georgia Supreme Court affirmed the imposition of the death penalty. This decision is in accordance with well-settled Georgia law that even if the finding of one or more aggravating circumstances must be set aside, the death penalty will be upheld if there still exists a single aggravating circumstance. Burger v. State, 245 Ga. 458, 460-461, 265 S.E.2d 797 (1980), cert. denied 446 U.S. 988 (1980); Gates v. State, 244 Ga. 587, 599, 261 S.E.2d 349 (1979), cert. denied 445 U.S. 938 (1980).

This Court has consistently recognized the Georgia law on this issue and has recently denied numerous Petitions for Writs of Certiorari from the Georgia Supreme Court. Hamilton v. State, 246 Ga. 264 n. 1, 271 S.E.2d 173 (1980), cert. denied ___ U.S. ___ (1981); Brooks v. State, 246 Ga. 262, 263, 271 S.E.2d 172 (1980), cert. denied ___ U.S. ___ (1981); Collins v. State, 246 Ga. 261, 262, 271 S.E.2d 352 (1980), cert. denied ___ U.S. ___ (1981).

In denying certiorari in an additional Georgia death case raising the same issue, Mr. Justice Stevens stated as follows:

> The Georgia Supreme Court . . . decided to adhere to its prior position that a death penalty imposed on the basis of a plurality of aggravating circumstances, each of which has been established beyond a reasonable doubt, will not be set aside simply because one of

> these aggravating circumstances is vulnerable . . . The Georgia Supreme Court's position is clear, and . . . I consider it consistent with this Court's decisions." Westbrook v. Balkcom, ___ U.S. ___ 101 S.Ct. 541, 543, 66 L.Ed.2d 298 (1980) (J. Stevens concurring).

Georgia's death penalty statute also was upheld in Gregg v. Georgia, 428 U.S. 153 (1976). This Court upheld the death penalty in Gregg even though the jury had been permitted under Georgia law to impose a death penalty for armed robbery. Id. at 161-62. The Georgia Supreme Court had ruled that the death penalty in the case of armed robbery was disproportionate to the crime committed. Gregg v. State, 233 Ga. 117, 210 S.E.2d 659 (1974); yet the fact that the jury considered and imposed the death penalty for armed robbery did not require that the death penalty for murder be vacated.

Petitioner argues that this Court's long line of reasoning and agreement with the Georgia Supreme Court's position be disregarded. Petitioner relies solely upon Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), a recent decision of the Fifth Circuit Court of Appeals in regard to which a Petition for Writ of Certiorari recently has been filed with this Court by the State of Georgia. In that case, the Fifth Circuit Court of Appeals determined that the death penalty could not be imposed when one aggravating circumstance was held to be unconstitutional, even though two other valid aggravating circumstances were found to exist.

It is clear that the Fifth Circuit Court of Appeals reliance in Stephens upon the authority of Stromberg v. California, 283 U.S. 359 (1931); accord, Bachellar v. Maryland, 397 U.S. 564 (1970); Street v. New York, 394 U.S. 576 (1969); Yates v. United States, 354 U.S. 298 (1957), was misplaced. In Stromberg v. California, supra, at 367-68, this Court noted that where there was a general verdict of guilty which could have rested on all or any one of three grounds, and one of the three grounds subsequently was determined to be unconstitutional, it was impossible to tell on which ground the verdict had rested, and therefore the conviction had to be set aside. Bachellar v. Maryland, supra; Street v. New York, supra and Yates v. United States, supra, upon which the Fifth Circuit Court of Appeals also relied, all involved general verdicts of guilty, each of which could have been based on an unconstitutional ground. In Stephens, however, the penalty verdict was not a general verdict, and the jury found, in addition to the unconstitutional aggravating circumstance, two valid aggravating circumstances, each of which by itself would be legally sufficient to permit the jury to impose the death penalty. Nevertheless, the Fifth Circuit Court of Appeals placed their reliance on Stromberg, supra, and reached a decision in direct conflict with well-settled law of the Georgia Supreme Court as well as with this Court's actions in denying similar Petitions for Writ of Certiorari from the Georgia Supreme Court.

The Respondent has shown that the holding of the Supreme Court of Georgia is consistent with the prevailing authority established by this Court and that the reliance of the Fifth Circuit Court of Appeals on Stromberg and other similar cases is misplaced. Therefore, Respondent respectfully submits that this Petition for Writ of Certiorari should be denied.

II. THE DECISION BY THE GEORGIA SUPREME COURT THAT THE IMPLIED MALICE CHARGE TO THE JURY WAS NOT AN UNCONSTITUTIONAL SHIFTING OF THE BURDEN OF PROOF COMPLIES WITH THE HOLDINGS OF THIS COURT.

At the trial level, Petitioner attacked the trial court's challenge regarding implied malice. The same challenge was set forth by Petitioner in the Georgia Supreme Court. The Supreme Court held that there was no error in the trial court's charge, citing previous Georgia decisions upholding charges containing identical language. Petitioner now challenges the holding of the Georgia Supreme Court.

In the lower courts and in this Court, Petitioner has attempted to extract a small portion of the jury charge to substantiate a claim that the charge was an impermissible shift of the burden of proof. It has long been the rule, however, that the charge to the jury must be viewed as a whole and not taken as a single instruction in artificial isolation. Cupp v. Naughten, 414 U.S. 141, 147 (1973). Thus, to properly determine the issue presented by the present Petition, this Court should consider more than the single sentence Petitioner has extracted from the charge to the jury.

The charge which Petitioner now challenges is found in Ga. Code Ann. § 26-1101 and reads as follows: "Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart." (T. 1118).

A closer examination of the charge reveals that the challenged portion, when read with the remainder of the charge, clearly does not shift the burden of proof to the Petitioner. The trial court, prior to reading the challenged charge, initially charged that the defendant had plead not guilty and that:

> [t]he defendant enters into the trial of this case with the presumption of innocence in his favor, and that presumption remains with him throughout the trial and until his guilt is established by the evidence beyond all reasonable doubt. The burden is on the State to prove every material allegation in this writ of indictment against this defendant to a moral and reasonable certainty beyond all reasonable doubt. (T. 1111).

At a later point in the charge, the trial court again charged that, "[t]he burden is on the State of proving [sic] beyond a reasonable doubt that the crime, if there was a crime, or crimes were committed by the defendant in Richmond County, Georgia." (T. 1115).

The Court then proceeded to charge on the necessity of criminal intent in a criminal prosecution. The trial court charged as follows:

> I further charge you that a person shall not be presumed to act with criminal intention, but the triers of the facts may find such intention upon consideration of the words, conduct, demeanor, and all other circumstances

> connected with the acts for which the accused has been prosecuted. The burden has always, it has always rested, and continues to rest upon the State to prove the act alleged to be criminal is in fact a criminal act beyond a reasonable doubt. (T. 1119).

This charge indicates clearly that the trial court carefully instructed the jury that criminal intent shall not be presumed and that the burden is on the State to prove the existence of criminal intent.

Petitioner alleges that the inclusion of the word "shall" in the implied malice charge mandates a finding of malice. However, it is clear that no presumption of malice is created merely by setting forth the definition of malice in the trial court's charge to the jury. In Franklin v. State, 245 Ga. 141, 263 S.E.2d 666 (1980), the Georgia Supreme Court considered the indentical implied malice charge and held:

> This charge on implied malice is definitional, i.e., it is in effect a statement that one definition of malice murder is an "implied malice murder" which is murder committed where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart. Whenever a definition is given in charge, the effect is superficially like that of a conclusion in that once the jury finds all the elements of the definition

> beyond a reasonable doubt, they have necessarily found the defined term. However, a definition differs from a presumption in that there can be no illegality as to the definition because it establishes the elements required to be proved whereas a presumption establishes a presumptive equivalency, which may be artificial or fictious, with the jury being authorized or required to find the one from the other. Id. at 155-156.

Thus, the challenged charge, as a definition, merely permits the trier of fact to accept or reject the implication of implied malice based upon an application of the particular facts to the definition and does not shift the burden of proof. See County Court of Ulster County, New York v. Allen, 99 S.Ct. 2213 (1979).

The implied malice charge as given to the jury is not one that could have been interpreted by reasonable jurors as either conclusive or as mandating a shift of the burden of proof to the defendant. See Sandstrom v. Montana, 99 S.Ct. 2450 (1979). Malice is not to be presumed at all but is merely to be implied from facts that the State must prove beyond a reasonable doubt.

Respondent has shown that the Georgia Supreme Court properly concluded that the implied malice charge was not an unconstitutional shift of the burden of proof. Therefore, Respondent respectfully submits that this Petition for Writ of Certiorari should be denied.

III. THE PRIOR CRIMINAL CONVICTIONS OF PETITIONER WERE PROPERLY SUBMITTED TO THE JURY, AND THEY WERE NOT ELEVATED TO STATUTORY AGGRAVATING CIRCUMSTANCES.

Petitioner argues that the introduction of prior criminal convictions, without accompanying precautionary instructions, elevated the prior convictions to statutory aggravating circumstances.

Ga. Code Ann. § 27-2503 specifically allows the jury to consider "additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any prior conviction and pleas."

Ga. Code Ann. § 27-2534.1(b) provides that the judge "shall include in his instructions to the jury for it to consider any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances . . .".

The Georgia Supreme Court in Davis v. State, 241 Ga. 376, 247 S.E.2d 45 (1978) addressed this issue and held that prior non-capital felonies are admissible as aggravating circumstances under Ga. Code Ann. § 27-2534.1, but that they cannot be used as statutory aggravating circumstances to authorize the imposition of the death penalty.

Allowing the jury to hear evidence of prior non-capital felony convictions does not elevate those convictions to a statutory aggravating circumstance as is alleged by Petitioner.

Evidence of the prior non-capital convictions merely gives the jury the information needed for them to weigh all the aspects of the defendant's character and record in accordance with the intent of Ga. Code Ann. §§ 27-2503 and 27-2534.1(b).

Nowhere in the trial court's charge to the jury did the judge refer to the Petitioner's prior convictions as a statutory aggravating circumstance. At the beginning of the presentence hearing the judge stated as follows:

> In this presentence hearing, counsel for both sides will have the right to present to the jury additional evidence in extenuation, in mitigation, and/or in aggravation as to punishment including the record of any prior criminal convictions and the pleas of guilty and pleas of nolo contendere of the defendant, or the absence of any such prior convictions or pleas. (T. 1159).

At the close of the presentation of the evidence the judge charged the jury on three statutory aggravating circumstances (T. 1223). He did not mention the evidence of Petitioner's prior criminal convictions nor did he refer to them as one of the three statutory aggravating circumstances that must be proven beyond a reasonable doubt. Thus, the jury was told in the charge exactly which three statutory aggravating circumstances were to be considered by them; the Petitioner's prior criminal record was not included in the charge.

The admission into evidence of Petitioner's prior criminal record was consistent with Georgia statutory and

case law, and thus the Georgia Supreme Court did not err in its review of this issue. Respondent respectfully submits that this Petition for Writ of Certiorari should be denied.

CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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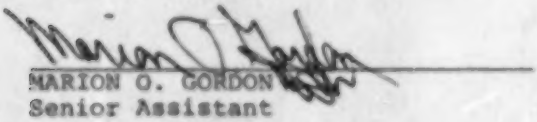

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CERTIFICATE OF SERVICE

I, John C. Walden, a member of the Bar of the Supreme Court of the United States and Counsel of Record for the Respondent, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief for the Respondent in Opposition by depositing three copies of same in the United States mail, with proper address and adequate postage to:

Mr. Charles L. Wilkinson III
Post Office Box 1565
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This 28th day of September, 1981.

JOHN C. WALDEN